Detailed and Legal Analysis

Of the Religious Freedom Amendment

House Joint Resolution 78

by U. S. Congressman Ernest J. Istook, Jr.

The Religious Freedom Amendment (House Joint Resolution 78)

"To secure the people's right to acknowledge God according to the dictates of conscience: Neither the United States nor any State shall establish any official religion, but the people's right to pray and to recognize their religious beliefs, heritage or traditions on public property, including schools, shall not be infringed. Neither the United States nor any state shall require any person to join in prayer or other religious activity, prescribe school prayers, discriminate against religion, or deny equal access to a benefit on account of religion."

As Revised April 1, 1998

Background

The Religious Freedom Amendment, House Joint Resolution 78, responds to the public's valid concern that our courts have become hostile to religion, placing barriers to religious expression which do not exist for other forms of free speech.

A false and impossible standard of unanimity has been created, saying that if a single person objects to a prayer or other religious expression, then an entire group must be silenced and censored. This is the exact opposite of free speech. Free speech exists only when people have a right to say something with which others disagree.

For over 36 years, court decisions have harmed religious freedom in America; the Religious Freedom Amendment (RFA) is intended as the solution, because the courts have left no other remedy than to amend the Constitution. Over 150 Members of the House of Representatives are co-sponsoring the RFA. It also is supported by a broad coalition that includes Christian groups, and Jewish groups, and Muslim groups. Support ranges from America's largest black denomination, the National Baptists, to the Salvation Army, Youth for Christ, and the country's largest Protestant group, the Southern Baptist Convention, and many more.

Supreme Court rulings on school prayer and other religious issues have provoked public outrage since 1962. Throughout the last 36 years, public opinion polls consistently show about 75% or more of the American public want a constitutional amendment supporting prayer in public schools.

Not since 1971 has such a constitutional amendment been voted upon in the House of Representatives.[1] The Senate conducted votes in 1966[2], 1970[3], and 1984[4]. Obviously, none of those succeeded. Additionally, related votes not involving a constitutional amendment have ranged from efforts to limit the jurisdiction of the federal courts, to equal access proposals, to riders on appropriations bills. (These efforts are described in detail in a 1996 report by the Congressional Research Service.[5]) In 1997, on March 4th, the House approved legislation (HCR 31) to promote display of the Ten Commandments on public property, despite Supreme Court rulings to the contrary. It prevailed by 295-125, a 70%

[1] Although the Judiciary Committee in 1971 refused to report any of several proposed prayer amendments, a discharge petition sponsored by Ohio Rep. Wylie successfully compelled a floor vote. Thereafter, on November 8, 1971, the language voted upon read, *"Nothing contained in this Constitution shall abridge the right of persons lawfully assembled, in any public building which is supported in whole or in part through the expenditure of public funds, to participate in voluntary prayer or meditation."* The vote was 240-162, falling 28 votes short of the necessary two-thirds majority needed, of the 402 House Members who voted.

[2] Sen. Dirksen of Illinois led the effort which promoted this language, *"Nothing contained in this Constitution shall prohibit the authority administering any school, school system, educational institution or other public building supported in whole or in part through the expenditure of public funds from providing for or permitting the voluntary participation by students or others in prayer. Nothing contained in this article shall authorize any such authority to prescribe the form or content of any prayer."* A vote on September 19, 1966, resulted in a 51-36 favorable vote to substitute this for other text, but the final vote of 49-37 was nine votes short of the two-thirds needed.

[3] During floor action on the proposed Equal Rights Amendment, Sen. Baker of Tennessee proposed adding this text to the ERA, *"Nothing contained in this Constitution shall abridge the right of persons lawfully assembled, in any public building which is supported in whole or in part through the expenditure of public funds, to participate in nondenominational prayer."* By 50-20, the text was added to the then-pending ERA. However, this plus another successful amendment, to exempt women from the military draft, were seen more as anti-ERA maneuvers than anything else, and final passage of the ERA (with this language added) was blocked at that time.

[4] A Reagan Administration initiative, S. J. Res. 73, was revised in committee to read, *"Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any state to participate in prayer. Neither the United States nor any state shall compose the words of any prayer to be said in public schools."* On March 20, 1984, the vote on this language was 56-44, falling 11 votes shy of the two-thirds needed.

[5] "School Prayer: The Congressional Response, 1962-1996", by David M. Ackerman, Legislative Attorney, American Law Division, October 16, 1996.

margin. It was, however, only a resolution of support, not changing any statutes or court decisions, much less changing the Constitutional language which the courts have misconstrued.

Text of the RFA

The RFA will end 27 years of inaction by the House on a constitutional amendment, by adding to our Constitution this language:

> ***"To secure the people's right to acknowledge God according to the dictates of conscience: Neither the United States nor any State shall establish any official religion, but the people's right to pray and to recognize their religious beliefs, heritage or traditions on public property, including schools, shall not be infringed. Neither the United States nor any State shall require any person to join in prayer or other religious activity, prescribe school prayers, discriminate against religion, or deny equal access to a benefit on account of religion."***[6]

H.J. Res. 78 also includes the normal protocol for submitting this text to the states for ratification, with a seven-year limit on that process.

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[6] This differs slightly from the language of H. J. Res. 78 as originally introduced. As introduced, the RFA read as follows:

> ***"To secure the people's right to acknowledge God according to the dictates of conscience: The people's right to pray and to recognize their religious beliefs, heritage or traditions on public property, including schools, shall not be infringed. The government shall not require any person to join in prayer or other religious activity, initiate or designate school prayers, discriminate against religion, or deny equal access to a benefit on account of religion."***

About "separation of church and state"

The phrase "separation of church and state" is a term whose usage has been officially condemned by the Chief Justice of the Supreme Court, William Rehnquist, and with good reason. He labels it a "mischievous diversion of judges from the actual intentions of the drafters of the Bill of Rights. . . . a metaphor based on bad history, a metaphor which has proved useless as a guide to judging." Rehnquist then stated his conclusion: "It should be frankly and explicitly abandoned."[7]

The term "separation of church and state" has been frequently used not to promote official neutrality toward public religious expression, but to promote hostility. Essentially, it suggests that whenever government is present, religion must be removed. Unfortunately under this philosophy, because government today is found almost everywhere, the growth of government dictates a shrinking of religion. "Separation" becomes a euphemism for "crowding out" religion.

A proper analysis should center on the actual text of the Constitution, but too often the language of the Constitution is ignored, and is replaced with a focus on the catch-phrase "separation of church and state." It is cited almost as a mantra, often in an effort to foreclose further discussion, and without critical analysis of what the phrase actually might mean. That phrase is not found in the Constitution; yet it commonly is erroneously treated as the standard measuring stick for religious freedom issues.

[7] Excerpted from Chief Justice Rehnquist's dissent in *Wallace v. Jaffree*, 472 U.S. 38 (1985)

A wrongful focus on this term inevitably becomes antagonistic to religion, because its premise is that wherever government exists, religion must be pushed aside, to maintain the "separation." Since American government today is far, far larger than in the days of our Founding Fathers, or than in any other era[8], its expansion automatically crowds out religious expression. When government enters, religion must exit. Our courts are blazes a wayward trail because they use a broken compass, a fact noted by dissenters on the Supreme Court. Chief Justice Rehnquist has decried the phrase as a "misleading metaphor" which the Court has followed "for nearly forty years[9]."

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[8] For example: Government runs most schools, with laws to compel attendance, and requires taxes to support those schools, even from those who pay to send their children to private schools. Charitable works, once the primary domain of the religious sector, now are dominated by government programs. The largest portion of American health care is paid in some way by a unit of government. Government runs most of the public welfare system, and massive quantities of public housing.

[9] Rehnquist commented at great length in his dissent to the graduation prayer case of *Wallace v. Jaffree*, 472 U.S. 38 (1985):

> Thirty-eight years ago this Court, in *Everson v. Board of Education*, 330 U.S. 1, 16 (1947) summarized its exegesis of Establishment Clause doctrine thus:
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> > 'In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.' *Reynolds v. United States*, [98 U.S. 145, 164 (1879)].'
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> This language from *Reynolds*, a case involving the Free Exercise Clause of the First Amendment rather than the Establishment Clause, quotes from Thomas Jefferson's letter to the Danbury Baptist Association the phrase 'I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and State.' 8 *Writings of Thomas Jefferson* 113 (H. Washington ed. 1861).
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> It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's' misleading metaphor for nearly forty years. Thomas Jefferson was of course in France at the time the constitutional amendments known as the Bill of Rights were passed by Congress and ratified by the states. His letter to the Danbury Baptist Association was a short note of courtesy, written fourteen years after the amendments were passed by Congress. He would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the Religions Clauses of the First Amendment."

Chief Justice Rehnquist thereafter presents a detailed account of the actual history of the development of the First Amendment's language on religious freedom.

After reviewing at great length both the extra-Constitutional origin of the phrase, and the history of the development of the First Amendment itself, Chief Justice Rehnquist in *Wallace v. Jaffree*, 472 U.S. 38 (1985) condemned the reliance on the phrase "separation of church and state". Among his comments:

> The evil to be aimed at, so far as those who spoke were concerned [in the Congress which approved the First Amendment], appears to have been the establishment of a national church, and perhaps the preference of one religious sect over another; but it was definitely not concern about whether the Government might aid all religions evenhandedly.
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> It would seem from this evidence that the Establishment Clause of the First Amendment had acquired a well-accepted meaning: it forbade establishment of a national religion, and forbade preference among religious sects or denominations. Indeed, the first American dictionary defined the word "establishment" as "the act of establishing, founding, ratifying or ordainin(g,") such as in "[t]he episcopal form of religion, so called, in England." 1 N. Webster, American Dictionary of the English Language (1st ed. 1828). The Establishment Clause did not require government neutrality between religion and irreligion nor did it prohibit the federal government from providing non-discriminatory aid to religion. There is simply no historical foundation for the proposition that the Framers intended to build the "wall of separation" that was constitutionalized in *Everson*.
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> Our recent opinions, many of them hopelessly divided pluralities, have with embarrassing candor conceded that the "wall of separation" is merely a "blurred, indistinct, and variable barrier," which "is not wholly accurate" and can only be "dimly perceived." [Citations omitted.]
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> **But the greatest injury of the "wall" notion is its mischievous diversion of judges from the actual intentions of the drafters of the Bill of Rights. . . . The "wall of separation between church and State" is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned.**
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> The Framers intended the Establishment Clause to prohibit the designation of any church as a "national" one. The Clause was also designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others. Given the "incorporation"

> of the Establishment Clause as against the States via the Fourteenth Amendment in *Everson*, States are prohibited as well from establishing a religion or discriminating between sects. As its history abundantly shows, however, nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion, nor does that Clause prohibit Congress or the States from pursuing legitimate secular ends through nondiscriminatory secular means.

The Religious Freedom Amendment reflects Rehnquist's analysis as Chief Justice of the Supreme Court, and corrects the decisions he criticizes.

Catch-phrases such as "separation of church and state"[10] have had a chilling effect in modern America because government has expanded into almost every area of life. If the church must be segregated from government, then government's entry into any activity is a *de facto* expulsion of religion from that area. The severity of the problem was noted by Pope John Paul II, on greeting the new American ambassador to the Vatican in December, 1997, when he stated, "It would truly be a sad thing if the religious and moral convictions upon which the American experiment was founded could now somehow be considered a danger to free society, such that those who would bring these convictions to

[10] Although it is the most-often used, this is not the only catch-phrase that is used to mislead in debate on these issues. The terms of "state-sponsored" prayer, and of "captive audience" are also misused often.

The term "state-sponsored" prayer is invoked to include situations when a school or government official simply **permits** prayer to occur, even when student-initiated. Thus, in the 1997 Alabama federal court ruling, *Chandler v. James*, CV-96-D-169-N (Middle District of Alabama), U.S. District Judge Ira Dement (at pages 7 & 8) permanently enjoined the schools from "permitting prayers, Biblical and scriptural readings, and other presentations or activities of a religious nature, at all *school-sponsored or school-initiated* assemblies and events (including, but not limited to, sporting events), regardless of whether the activity takes place during instructional time, regardless of whether attendance is compulsory or noncompulsory, and regardless of whether the speaker/presenter is a student, school official, or nonschool person."

The "captive audience" notion is never used to express concern for the majority of students, who are required to be in school, yet required to leave their normal religious expressions behind while they are there—which is the largest segment of their waking day. As Justice Potter Stewart noted in his dissent in *Abington v. Schemp*, "a compulsory state educational system so structures a child's life that if religious exercises are held to be an impermissible activity in schools, religion is placed at an artificial and state-created disadvantage. Viewed in this light, permission of such exercises for those who want them is necessary if the schools are truly to be neutral in the matter of religion."

bear upon your nation's public life would be denied a voice in debating and resolving issues of public policy. The original separation of Church and State in the United States was certainly not an effort to ban all religious conviction from the public sphere, a kind of banishment of God from civil society."

How will the RFA change the outcome of previous Supreme Court decisions?

As noted in numerous examples, some of which follow, the RFA reflects the opinions expressed by many Supreme Court justices prior to the Court's detours in recent years, and also reflects the dissenting opinions of many Justices during this period. (Often these were 5-4 decisions, meaning the dissenters were but a single vote short of being a majority.) The RFA effectively incorporates (or re-incorporates) their arguments into the Constitution.

The following are some of the key decisions which are affected:

Engel v. Vitale

---The threshold case of *Engel v. Vitale*[11] held that government may not compose any official prayer or compel joining in prayer. This portion of *Engel* would remain intact.

[11] *Engel v. Vitale*, 370 U.S. 421 (1962)

However, that portion of *Engel* which precluded students from engaging in group classroom prayer***even on a voluntary basis*** would be corrected by the RFA[12].

Abington School District v.Schemp

---*Abington School District v. Schemp*[13], to the extent that it prohibited the composition or imposition of prayer by an entity of government, would remain the law under the RFA. But to the extent that *Abington* broadly permits the Establishment Clause to supersede the Free Exercise Clause, it would yield to the standard enunciated in Justice Stewart's dissent:

> "It is, I think, a fallacious oversimplification to regard these two provisions as establishing a single constitutional standard of "separation of church and state," which can be mechanically applied in every case to delineate the required boundaries between government and religion. We err in the first place if we do not recognize, as a matter of history and as a matter of the imperatives of our free society, that religion and government must necessarily interact in countless ways. Secondly, the fact is that while in many contexts the Establishment Clause and the Free Exercise Clause fully complement each other, there are areas in which a doctrinaire reading of the Establishment Clause leads to irreconcilable conflict with the Free Exercise Clause."

Wallace v. Jaffree

---The prohibition on silent prayer in public schools, incorporated into *Wallace v. Jaffree*[14], would be corrected by the RFA. Silent prayer (as well as vocal prayer) would

[12] The pertinent portion of *Engel* stated, "Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause, of the First Amendment, both of which are operative against the States by virtue of the Fourteenth Amendment." To this Justice Stewart wrote in dissent, "With all respect, I think the Court has misapplied a great constitutional principle. I cannot see how an "official religion" is established by letting those who want to say a prayer say it. On the contrary, I think that to deny the wish of these school children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our Nation."

[13] *Abington School District v.Schemp*, 374 U.S. 203 (1963)

[14] *Wallace v. Jaffree*, 472 U.S. 38 (1985)

be legitimized, so long as there was no government dictate either to compel that it occur, or to compel any student to participate.

As Chief Justice Burger stated in his dissent in *Wallace v. Jaffree*:

> It makes no sense to say that Alabama has "endorsed prayer" by merely enacting a new statute "to specify expressly that voluntary prayer is *one* of the authorized activities during a moment of silence, . . . To suggest that a moment-of-silence statute that includes the word "prayer" unconstitutionally endorses religion, while one that simply provides for a moment of silence does not, manifests not neutrality but hostility toward religion.
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> The notion that the Alabama statute is a step toward creating an established church borders on, if it does not trespass into, the ridiculous. The statute does not remotely threaten religious liberty; it affirmatively furthers the values of religious freedom and tolerance that the Establishment Clause was designed to protect. Without pressuring those who do not wish to pray, the statute simply creates an opportunity to think to plan, or to pray if one wishes . . .

In Justice Potter Stewart's dissent from *Abington*, he found permitting school prayer is a necessary element of diversity

> ". . . the duty laid upon government in connection with religious exercises in the public schools is that of refraining from so structuring the school environment as to put any kind of pressure on a child to participate in those exercises; it is not that of providing an atmosphere in which children are kept scrupulously insulated from any awareness that some of their fellows may want to open the school day with prayer, or of the fact that there exist in our pluralistic society differences of religious belief."

Lee v. Weisman

---Graduation prayers (so long as *not* prescribed by government) would be freed of the prohibition in *Lee v. Weisman*, 505 U.S. 577 (1992). Justice Kennedy wrote in that case that the normal expectation of respectful silence (which is expected for so many other

school programs), became coercion when a rabbi offered a graduation prayer, because it creates "pressure, though subtle and indirect, . . . as real as any overt compulsion."

The RFA takes issue with Justice Kennedy's view, and instead embodies the views of the four Justices who dissented to this 5-4 decision. Whether at a graduation or other school setting, the RFA incorporates the conclusions of these four Justices (Scalia, Rehnquist, White and Thomas) that "hearing" is not "participating" and "hearing" is not "joining" in prayer, and thus there was no coercion to pray.

The Court never explained how expecting respect for a rabbi's prayer at graduation is worse or more "coercive" than expecting courtesy and quiet for non-religious school presentations, or for the Pledge of Allegiance which was also a part of the graduation ceremony. The majority, though, turned its back on neutrality by holding that expecting courtesy and tolerance is coercive, *even though seeking respect for non-religious speech was normal and permitted.* But because *Lee v. Wiseman* transmuted simple listening into "participation", the Religious Freedom Amendment instead requires something greater than this before an activity is deemed to be an infringement of rights. The RFA applies a simple common-sense standard that makes prayer an expressly-permitted activity, so long as *actual joining-in and/or prescribing of prayer* are not required. Listening is not joining and is not participating and is not coercion.

In dissenting to *Lee v. Wesiman*'s 5-4 ruling, Justice Scalia called the new "psychological coercion" standard "boundless, and boundlessly manipulable".[15] He noted that prayer at school graduations had been standard since the first known graduation from

[15] at 505 U.S. 632

a public high school, in Connecticut in July 1868.[16] Just as the RFA now does, Justice Scalia and the other three dissenting justices distinguished between being present and actually joining in a prayer. As these four justices wrote (at 636):

> . . . According to the [majority opinion of the] Court, students at graduation who want "to avoid the fact or appearance of participation," . . . in the invocation and benediction are psychologically obligated by "public pressure, as well as peer pressure, . . . to stand as a group or, at least, maintain respectful silence" during those prayers. This assertion—the very linchpin of the Court's opinion—is almost as intriguing for what it does not say as for what it says. *It does not say, for example, that students are psychologically coerced to bow their heads, place their hands in a Durer-like prayer position, pay attention to the prayers, utter "Amen," or in fact pray. . . . It claims only that students are psychologically coerced "to stand . . . or, at least, maintain respectful silence."* . . . The Court's notion that a student who simply sits in "respectful silence" during the invocation and benediction (when all others are standing) has somehow joined—or would somehow be perceived as having joined—in the prayers is nothing short of ludicrous."

The standard of Lee v. Weisman's bare 5-4 majority has been dangerous, because it declares that simple exposure to religious speech (like exposure to pornography) is so inherently damaging that people must be protected from it. In the majority opinion, Justice Kennedy wrote (at 505 U.S. 594), "Assuming, *as we must*, that the prayers were offensive . . .". Even pornography is granted a chance to be measured against prevailing community standards; but prayer is *assumed automatically* to be offensive. Lee v. Weisman's subjective standard permits a lone "offended" individual to silence all others in a public place, thereby censoring their religious expressions.

The effect of this ruling was to create the dangerous notion of a new "freedom from hearing" right which is superior to others' express free speech rights under the First

[16] at 505 U.S. 635-636

Amendment. This is especially insidious and chilling when it is used for prior restraint of religious speech. It also perpetuates the notion that an offense to a few must be corrected, even if doing so gives offense to the vast majority. As Justice Kennedy noted (505 U.S. 595), "for many persons an occasion of this significance lacks meaning if there is no recognition, however brief, that human achievements cannot be understood apart from their spiritual essence." But he found that interest immaterial, so long as any one person was offended. The four dissenters took a view much more in keeping with respecting the rights of **all**, and not just of a few. They noted that, in trying to avoid offense to one student and one parent, the Court's anti-graduation prayer ruling ignored the fact that it was giving offense to all the other students and parents. They stated (at 505 U.S. 645):

> The reader has been told much in this case about the personal interest of Mr. Weisman and his daughter, and very little about the personal interest on the other side. They are not inconsequential. Church and state would not be such a difficult subject if religion were, as the Court apparently thinks it to be, some purely personal avocation that can be indulged entirely in secret, like pornography, in the privacy of one's room. For most believers it is not that, and has never been. Religious men and women of almost all denominations have felt it necessary to acknowledge and beseech the blessing of God as a people, and not just as individuals, because they believe in the "protection of divine Providence," as the Declaration of Independence put it, not just for individuals but for societies; because they believe God to be, as Washington's first Thanksgiving Proclamation put it, the "Great Lord and Ruler of Nations." One can believe in the effectiveness of such public worship, or one can deprecate and deride it. But the longstanding American tradition of prayer at official ceremonies displays with unmistakable clarity that the Establishment Clause does not forbid the government to accommodate it.

Lee v. Weisman, in discussing the tradition of graduation prayer, also included an interesting note that the practice was part of the first known American graduation ceremony. As it noted (at 505 U.S. 635):

> By one account, the first public high school graduation ceremony took place in Connecticut in July. 1868 - the very month, as it happens, that the Fourteenth Amendment (the vehicle by which the Establishment Clause has been applied against the States) was ratified - when "15 seniors from the Norwich Free Academy marched in their best Sunday suits and dresses into a church hall and waited through majestic music and long prayers.

Under the pretense of promoting tolerance, our courts have thus been used to promote censorship. The RFA corrects this, protecting the rights of both minorities and majorities. The Constitution and the Bill of Rights were intended to protect each and every one of us,*not* merely some of us.

Stone v. Graham

---The ability to post the Ten Commandments on public property (as an expression of religious beliefs, heritage or traditions of the people), prohibited by *Stone v. Graham*[17], becomes protected under the RFA, although there would be neither a mandate nor a guarantee that it would be proper under all circumstances. But *Stone v. Graham's* *automatic* prohibition on such a display would be ended.

Stone's majority decision expressed concern that posting the Ten Commandments would "induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments."[18] But, in dissent, Chief Justice Rehnquist noted[19]:

> The Establishment Clause does not require that the public sector be insulated from all things which may have a religious significance or origin. .

[17] *Stone v. Graham*, 449 U.S. 39 (1980)

[18] at 449 U.S. 42

[19] at 449 U.S. 45-46

> . . Kentucky has decided to make students aware of this fact by demonstrating the secular impact of the Ten Commandments.

Chief Justice Rehnquist then quotes from a 1948 opinion[20] by former Justice Jackson:

> . . . Perhaps subjects such as mathematics, physics or chemistry are, or can be, completely secularized. But it would not seem practical to teach either practice or appreciation of the arts if we are to forbid exposure of youth to any religious influences. Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view. . . . I should suppose it is a proper, if not an indispensable, part of preparation for a worldly life to know the roles that religion and religions have played in the tragic story of mankind. The fact is that, for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences, derived from paganism, Judaism, Christianity--both Catholic and Protestant—and other faiths accepted by a large part of the world's peoples.

Lemon v. Kurtzman

---*Lemon v. Kurtzman*[21] and its subjective three-pronged test have often been used to achieve a desired result rather than to guide an analysis. The *Lemon* test would necessarily be revised, because a "purely secular" objective would no longer be compulsory. Recognition of religious heritage, tradition or belief would be a proper objective, so long as it did not rise to the level of promoting a particular faith.

[20] McCollum v. Board of Education, 333 U.S. 203 (1948)

[21] *Lemon v. Kurtzman*, 402 U.S. 603 (1971)

Allegheny v. ACLU

---The case of *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*[22], would be brought back into line with *Lynch v. Donnelly*[23]. (Both were 5-4 decisions.) The so-called "plastic reindeer" test for holiday symbols on public property would no longer be decisive. *Lynch* permitted display of a government-owned Nativity scene, whereas *Allegheny* restricted the display of a private creche on public property, citing a need for better visual "balance" with secular emblems. It would be no more compulsory to add secular items to a religious display than to require adding religious symbols to "balance" purely secular displays.

A truer test would consider whether symbols of differing faiths were afforded similar opportunity for display during their special seasons. The proper test would be whether government sought to establish an official religion, rather than outlawing traditions from a public forum.

The Religious Freedom Amendment would correct the Supreme Court's bias that secular symbols, *regardless of how perverse*, are constitutionally-protected for public display,[24] whereas religious symbols are considered suspect. The intent of the RFA is to

[22] *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989)

[23] *Lynch v. Donnelly*, 465 U.S. 668 (1984)

[24] In *R.A.V., Petitioner v. City of St. Paul, Minnesota*, 505 U.S. 377 (1992), the Supreme Court held that a "hate crimes" law banning cross-burnings and Nazi swastikas was unconstitutional on its face. In *National Socialist Party v. Skokie*, 432 U.S. 43 (1977), the Court upheld the right of neo-Nazis to parade with swastikas and anti-Semitic literature through the midst of a predominantly Jewish community.

re-establish true neutrality, by affording religious expression the same equal protection as other expression, rather than the pretense of neutrality that too often exists in name only.[25] The carryover of true neutrality would extend to other aspects of once-common but now-suppressed reflections of beliefs, heritage and traditions. School holiday programs would not feel the pressure to limit songs to "Frosty the Snowman" or "Rudolph the Red-Nosed Reindeer". The carols of Christmas, the hymns of Thanksgiving, the songs of Hanukkah, and those of other holidays and other faiths would be welcome. Tolerance and understanding would be promoted, rather than avoided. The standard would be that reflections of faith, ***meaning minority faiths as well as majority faiths*** , are clearly permitted, so long as it does not progress into advocating or promoting any particular faith.

[25] Justice Potter Stewart's dissenting comments in *Abington v. Schemp* provide an apt description of true neutrality, in contrast with the antagonism that can masquerade as neutrality. As he wrote, "It might also be argued that parents who want their children exposed to religious influences can adequately fulfill that wish off school property and outside school time. With all its surface persuasiveness, however, this argument seriously misconceives the basic constitutional justification for permitting the exercises at issue in these cases. ***For a compulsory state educational system so structures a child's life that if religious exercises are held to be an impermissible activity in schools, religion is placed at an artificial and state-created disadvantage. Viewed in this light, permission of such exercises for those who want them is necessary if the schools are truly to be neutral in the matter of religion***"

Section-by-section review of the RFA

Preamble: ***"To secure the people's right to acknowledge God according to the dictates of conscience: . . ."***

The preamble has a purpose. As former Chief Justice Story described the nature of a constitutional preamble, "Its true office is to expound the nature and extent and application of the powers actually conferred by the Constitution, and not substantively to create them."[26] The preamble to H.J. Res. 78 serves principally to indicate intent, to assist in interpreting the substantive provisions.

The concept of this particular preamble is attributed chiefly to Forest Montgomery, legal counsel for the National Association of Evangelicals. There is nothing unique or unusual, however, to have constitutional language which expressly mentions God. Such language is the rule, and not the exception, in our state constitutions.

Critics of this mention of God should review the constitutions of our 50 states. Through these, the American people have freely embraced attitudes very different from those expressed by the U.S. Supreme Court. All fifty of our states[27] have adopted express and explicit mentions of God in their constitutions or preambles. The attached Appendix details the express language, from each of the states.

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[26] Story, Joseph, *Commentaries on the Constitution of the United States* (1833), Sec. 462.

[27] In testimony given in 1997 by Rep. Istook regarding the RFA, it was indicated that five states lacked a reference to God in their state constitutions. This was inaccurate. Corrective research indicates that the five 'missing' states—New Hampshire, Oregon, Tennessee, Vermont and Virginia, in fact **do** refer expressly to God in their state constitutions.

In Alaska, the constitution states that its citizens are "grateful to God and to those who founded our nation . . . , in order to secure and transmit to succeeding generations our heritage of political, civil and religious liberty". In Colorado, theirs reads, "with profound reverence for the Supreme Ruler of the Universe." Idaho states, "grateful to Almighty God for our freedom," which is the *identical phrase* used by California, and Nebraska, and New York, and Ohio, and Wisconsin. Pennsylvania phrases it as "grateful to Almighty God for the blessings of civil and religious liberty, and humbly invoking His guidance."

Some go even farther. Maryland's Article 36 declares "the duty of every man to worship God." Maryland's constitution further states that nothing in it shall prohibit references to God or prayer "in any governmental or public document, proceeding, activity, ceremony, school, institution, or place" and declares that those things are *not* considered to be an establishment of religion. Virginia's refers to the "duty which we owe to our Creator" and to the "mutual duty of all to practice Christian forbearance, love and charity."

These references to God are typical of our state constitutions.

Just as America adopted "In God We Trust" as our national motto, the states have mottoes, often incorporated on their state seals. Arizona's seal states, "Ditat Deus", meaning "God Enriches." Florida's seal states, "In God We Trust." Ohio doesn't put it on a seal, but proclaims its motto, "With God, All Things Are Possible."[28]

[28] Just as litigation is pending on many other fronts, challenging prayers at schools, graduations, football games, etc., it is also happening over the Ohio motto. Ohio is being sued to block any further use of this motto.

The Religious Freedom Amendment echoes the philosophy found in our state constitutions, namely that faith guided the creation of America's common principles and ideals, and faith is at the core of preserving them. It tracks the essence of the Declaration of Independence, wherein our Founding Fathers proclaimed that our rights come not from government, but from God, declaring, "*We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights; that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men.*"

The Religious Freedom Amendment also applies a phrase common to many of the original state constitutions: "according to the dictates of conscience". Virginia used it in 1776 as part of its Declaration of Rights, proclaiming, "all men are equally entitled to the free exercise of religions, *according to the dictates of conscience.*" It appeared with slight variations in the original constitutions of Delaware, New Jersey and North Carolina (all 1776), Vermont (1777), Massachusetts (1780) and New Hampshire (1784). Today, this phrase of "according to the dictates of conscience" is echoed in the constitutions of 28 states—Arkansas, Connecticut, Delaware, Georgia, Indiana, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia and Wisconsin.

It must always be stressed that the Religious Freedom Amendment is not intended to override the First Amendment's prohibitions on establishing any religion as a state religion and on creating official status for any set of beliefs. The RFA would not do this. The preamble's inclusion of the phrase, "according to the dictates of

conscience," is the first of multiple protections within the Religious Freedom Amendment to safeguard the rights of religious minorities.

The term "according to the dictates of conscience" does *not*, however, protect lewd behavior under the claim or pretense of religion. Although worded in absolutist fashion, the First Amendment nevertheless yields when necessary to avoid "substantial threat to public safety, peace, or order".[29] The courts have determined that free exercise of religion is not a license to disregard general statutes on behavior, such as those against advocating violent overthrow of the government,[30] outlawing polygamy[31], use of illegal drugs[32], prostitution[33], and even snake-handling[34]. The right to free speech does not permit shouting "Fire!" in a public theater[35], or wanton and intentional libel and slander[36]. Free speech does not give students a right to interrupt and usurp class time to speak whenever they want about whatever they want. Neither does the RFA. The RFA would not permit or sanction disruptive behavior by those wishing to pray or to speak about religion. It

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[29] *Sherbert v. Verner*, 374 U.S. 398 (1963)

[30] *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) holding it is not protected to advocate "imminent lawless action if likely to incite or produce such action". See also 18 United States Code, Sec. 2385, being the criminal code's prohibition of advocating violent overthrow of the government and related offenses.

[31] *Reynolds v. United States*, 98 U.S. 154 (1878)

[32] *Olsen v. Drug Enforcement Administration*, 878 F.2d 1458 (D.C. Cir. 1989), *cert. den.*, 494 U.S. 906 (1990); *United States v. Rush*, 738 F.2d 457 (1st Cir. 1984), *cert. den.*, 470 U.S. 1004 (1985); and *United States v. Middleton*, 690 F.2d 820 (11th Cir. 1982), *cert. den.*, 460 U.S. 1051 (1983).

[33] *Tracy v. Hahn*, 940 F.2d 1536 (9th Cir. 1991).

[34] *Pack v. Tennessee*, 527 S.W. 2d 99 (Tenn. 1975),*cert. den.*, 424 U.S. 954 (1976).

[35] *Schenck v. United States*, 249 U.S. 47, 52 (1919), wherein Justice Holmes wrote, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic."

[36] *New York Times v. Sullivan*, 376 U.S. 254, 279-280 (1964); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

does not open public schools to anyone who might wish to enter to bring in their own religious message. Trespass remains trespass. The RFA simply permits religious openness by those students who have a right (and usually a legal obligation) to attend school.

"The people's right" is a right held both by individuals and as a collective group. The RFA does not, however, create a mechanism for government officials to begin dictating wholesale inclusion of religious symbols for constant or incessant display on public property, ***because they would remain bound by the First Amendment's prohibition against establishing an official religion via government!*** The RFA simply shifts the boundary, away from exclusionism and into greater accommocation, but stops well short of actual endorsement of religion. It provides a check upon the court challenges which have erroneously equated and confused accommodation and recognition with endorsement.

The RFA would correct the trend of using the Establishment Clause to run roughshod over the Free Exercise Clause. The First Amendment consciously established a tension by stating not only what government could not do, but also stating what the people ***could*** do. Our courts have instead used it to halt voluntary religious expressions by citizens, individually and collectively, whenever government has some connection.

Because the scope and intrusiveness of government into all aspects of American society has grown so rapidly, it has become all-pervasive, making it a rare occasion when there is no presence of government. Accordingly, the judicially-created "wall of separation" has become a moving wall. As the presence of government

constantly expands, this standard crowds out opportunities for religion to be present and to flourish. As shown by the recent ruling in *City of Boerne v. Flores, Archbishop*[37] even a church's ability to have room to seat its worshippers is subjected to government control. This was never the intention of our Founding Fathers.

The RFA's preamble stresses our shared belief that government should accommodate and protect religious freedom, but it simultaneously stresses that government should not and must not dictate in regard to religion. By concluding with the safeguard of "according to the dictates of conscience," the preamble assures that as it protects religious expression in public places, it nevertheless cannot be used to dictate expression or non-expression of beliefs, nor can it be used to favor one religious faith over another.

Protecting religious expression: ***" Neither the United States nor any State shall establish any official religion, but the people's right to pray and to recognize their religious beliefs, heritage or traditions on public property, including schools, shall not be infringed. . . ."***

Never an Official Church

This phrase draws a clear boundary beyond which government cannot go. No public property occasion which recognizes religious beliefs, heritage or tradition, and no such exercise of the right to pray shall rise to the level of denoting any religion as official.

[37] *City of Boerne v. Flores, Archbishop* 521 U.S. ___, 1997 WL 345322, June 25, 1997

This follows the intent of the drafters of the First Amendment, as understood by now-Chief Justice William Rehnquist and related in his opinion in *Wallace v. Jaffree*:

> The evil to be aimed at, so far as [its drafters] were concerned, appears to have been the establishment of a national church, and perhaps the preference of one religious sect over another, but it was definitely not concern about whether the Government might aid all religions evenhandedly.[38]

Government should accommodate America's faiths, and the emphasis they have always received in this nation's life, but should not be promoting any one faith in particular. For example, the RFA would not permit government to proclaim officially that the United States is a "Christian nation", nor a "Jewish nation," "Muslim nation," nor that of any other particular faith. But the supposed accommodation under current rulings is typically a pretense, the functional equivalent of no accommodation at all.

The proper standard of accommodation was described by then-Chief Justice Warren Burger, in *his* dissent to *Wallace v. Jaffree*, 472 U.S. 38, at 90:

> The statute [permitting a moment of silence, and thus silent prayer, in Alabama's public schools] "endorses" only the view that the religious observances of other should be tolerated and, where possible, accommodated. If the government may not accommodate religious needs when it does so in a wholly neutral and noncoercive manner, the "benevolent neutrality" that we have long considered the correct constitutional standard will quickly translate into the "callous indifference" that the Court has consistently held the Establishment Clause does not require.
>
> The Court today has ignored the wise admonition of Justice Goldberg that "the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow.

The language to permit religious expression on public property is the first corrective segment of the RFA; the second is the portion dealing with non-discrimination.

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[38] *Wallace v. Jaffree*, 472 U.S. 38 (1985)

The text of the RFA uses the two-part structure employed by the First Amendment, intended to balance freedom from state-imposed religion (via the so-called Establishment Clause, "Congress shall make no law respecting an establishment of religion . . .") with freedom of religion (via the so-called Free Exercise Clause, "or prohibiting the free exercise thereof"). The RFA likewise echoes the prohibition on an official religion, then follows it with language clearly indicating that the intent is not to restrict religion, but to maximize it. The RFA's terms are necessarily more explicit than the First Amendment, as a necessity to correct court rulings of recent years.

The RFA reflects former Chief Justice Warren Burger's comments about how government should accommodate expressions of religious tradition, heritage and belief. As he wrote in *Lynch v. Donnelly*, 465 U.S. 668, at 675 (1984) (and before *Lynch* was undercut by a later 5-4 ruling):

> [t]here is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789" and that there are "countless . . . illustrations of the Government's acknowledgment of our religious heritage and governmental sponsorship of graphic manifestations of that heritage." These included, in part:
>
> --"invocations of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders";
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> --George Washington's designation of a religiously-toned Thanksgiving, which 80 years later was made a national holiday;
>
> --the designation of Christmas as a national holiday and the grant of paid leave to public employees on that day;
>
> --Presidential proclamations commemorating other religious events, such as the Jewish High Holy Days;
>
> --Usage of "In God We Trust" as a national motto, and on coins and currency;
>
> --Display of religious paintings in publicly-supported art galleries [to which he could have added the religious overtones of many of the depictions in Statuary Hall in the U.S. Capitol itself].

Who Are "The People"?

The word "people" was purposefully chosen rather than specifying simply "a person's right" or "every person's right" to pray, and to recognize religious tradition, heritage or belief. In speaking of "the people's right", the RFA embodies "people" in both the individual and the collective meaning of the word. This is consistent with the dual usage already employed by Constitutional references to "the people."

In its Preamble, the Constitution opens with "We the People", thus referring to the **collective** conduct of the American people acting to create their government.

The First Amendment uses an obviously collective sense of "people" when it proclaims "the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

The Fourth Amendment employs it to indicate individual rights in protecting "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."

The Ninth and Tenth Amendments make obvious reference to the collective rights of the people, using their instrumentality of government, in specifying that "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." and that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

Protecting Key Decisions

The RFA is also intended to preserve and protect the precedential value of Supreme Court decisions favorable to religious freedom and to even-handed treatment of

religion, namely *Marsh v. Chambers*, 463 U.S. 783 (1983) and *Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S. Ct. 2510 (1995). Without the RFA, the future of these precedents is problematical, because they are isolated exceptions to the trends of the Supreme Court in other religious freedom cases. Their viability and precedential value is subject to sudden change by the Court, absent the RFA.

The RFA also cements the precedent of another series of Supreme Court decisions, relating to government providing of benefits to students who are in parochial schools. That ruling, in the 5-to-4 decision in *Agostini v. Felton*, is discussed as part of the "benefits" clause of the RFA, later in this document.

Marsh v. Chambers, 463 U.S. 783 (1983), by 6-to-3 upheld the constitutionality of prayers by a government-paid chaplain, at the opening of legislative sessions.[39] *Rosenberger* by a 5-to-4 Court margin directed that when a public university funded other student publications, it could not refuse to assist one with a Christian association.

These decisions in *Marsh v. Chambers* and *Rosenberger v. Rector* are protected by the Religious Freedom Amendment, guarding them from the vagaries of back-and-forth shifting margins on the Supreme Court.

Protecting Rights of the People

H.J. Res. 78 does not seek to protect religious rights simply by restricting the power of government; it also proclaims an affirmative right of the people themselves. The Bill of Rights and other Constitutional amendments have likewise used both approaches to

[39] A similar standard was enunciated in dissent by Justice Potter Stewart in *Engel v. Vitale*, who wrote that school prayer was not an "official religion," but simply an effort ". . . to recognize and to follow the deeply entrenched and highly cherished spiritual traditions of our Nation - traditions which come down to us from those who almost two hundred years ago." Justice Stewart then elaborated with numerous references to the statements and conduct of the Founding Fathers.

establish and protect rights of the people.[40] The Religious Freedom Amendment expressly declares the rights of the people, to make its intent clearer to the courts. (But, as previously noted, the absolutist statement of an affirmative right does not impede reasonable requirements for the time, place and manner of speech. For example, the RFA does **not** give a student any right to disrupt class by spontaneously offering a prayer, just as the First Amendment does not give them any right to disrupt class by spontaneously launching into any other form of speech.)

"Public property" as used in the RFA is synonymous with "government property", but is **not** limited to real estate. In a proper case, it can for example address public property such as a city seal which contains a depiction of a community's heritage, traditions or beliefs. Thus, the limiting test is to assure that any role of government ***does not go beyond recognizing religious belief, heritage or tradition, and avoids becoming the promoting of any religion.*** The RFA does not repeal the Establishment Clause of the First Amendment, but interacts with it, restoring the former balance between the Establishment Clause and the Free Exercise Clause. Use of public property to go beyond the Equal Access Act, to go beyond recognition and into promotion of a religion would continue to run afoul of the Establishment Clause of the First Amendment.

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[40] The First Amendment prohibits Congress from making any law "respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech," etc. The Second Amendment says the affirmative right "of the people to keep and bear arms shall not be infringed." The Fourth Amendment sets forth "the right of the people" against unreasonable searches and seizures, and then limits the government's ability to issue warrants, except for probable cause. The Fourteenth Amendment gives citizenship to all persons born or naturalized in the U.S., then restricts the states with equal protection and due process requirements. These and other examples illustrate the duality of protections, both by establishing affirmative rights of the people, and by restrictions upon the conduct of government.

Protecting individual conscience and minorities: ***". . . Neither the United States nor any State shall require any person to join in prayer or other religious activity, [or] prescribe school prayers . . ."***

The RFA does contain any language to overturn the First Amendment's prohibition on establishing an official religion, neither expressly nor impliedly. Nevertheless, it contains protective language as an extra safeguard to assure this. The RFA echoes the pattern of the First Amendment, with both a prohibition on establishing an official church, coupled with guarantees intended to assure maximum religious liberty.

No school prayer (nor any religious activity) could ever be mandatory; the RFA **explicitly** makes this clear. It demonstrates an abundance of caution and concern for religious freedom for all, in particular for any who may be in a minority in their area. It does not permit a large group to muzzle or suppress a small group; it does not permit a small group to muzzle or censor a large group. Nor does it permit anyone to compel prayer or other religious conduct by those who do not wish to participate.

Neither the federal nor state government could prescribe prayer. This covers both principal definitions of "prescribe". It could not "prescribe" prayers, in the sense that it could not direct that they occur; under the RFA, that initiative properly comes from students. Nor could government "prescribe" prayer, in the sense that it could not dictate the content of prayer.

This language reinforces the "according to the dictates of conscience" protection of the RFA's preamble.

The RFA effectively endorses and follows the standard applied by the Supreme Court in *West Virginia State Board of Education v. Barnette*[41]. There, the Court correctly ruled that no child could or should be compelled to say the Pledge of Allegiance. However, the Court did *not* create a right for an objecting student to prohibit their classmates from saying the Pledge.

Providing equal protection: ***". . . [Neither the United States nor any State shall] . . . discriminate against religion, or deny equal access to a benefit on account of religion."***

Ending Discrimination Against Religion

Religious symbols and religious behavior are treated by current court decisions as being automatically suspect when they occur on public property, or in association with a government activity or program.[42] But unlike the standard on religion, secular symbols, behavior, or activity are not pre-burdened. This discriminatory dual standard is prohibited by the RFA. The amendment does not prohibit positive accommodation of religion, such as non-profit tax treatment, but focuses instead to bar discrimination *against* religion.

[41] *West Virginia State Board of Education vBarnette*, 319 U.S. 624 (1943)

[42] There is also lack of balance regarding *which* symbols are treated as suspect. Typically, only symbols of a majority faith, such as a Christian cross, are ordered to be removed. Yet many other emblems are used as symbols of different faiths. The thirteen stars on the Great Seal of the United States remain arranged as a Star of David, a symbol of the Jewish faith. Banning all symbols of a religion also becomes problematic because they are so numerous, and often are also used for other purposes. The swastika is a condemned symbol of Nazism to most, but also is a sacred symbol for many Hindus. A hammer is a symbol of Norse mythology, and small hammers were often worn on necklaces, akin to the practice of Christians wearing a cross pendant. Kites have religious symbology in Japan. Beetles (scarabs) are religious symbols for Egyptian sun worship. A spokesman for Americans United for Separation of Church and State has even mentioned (although perhaps not seriously) banning witches from school Halloween displays, because of possible religious significance.

The Congressional Research Service reported recently on 30 instances of federal statutes and regulations which assure that government does not subsidize religious practices of receiving organizations. But CRS also found an additional 51 federal statutes and regulations which disqualify religious organizations or adherents from neutral participation in generalized government programs.[43] This discrimination needs correction.

There is a growing recognition that faith-based programs can succeed, winning results even when other programs cannot, to combat crime and violence, teen pregnancy, welfare dependency, recidivism, and other social problems. To disqualify them because of their religious component not only violates the notion of neutrality, but denies assistance to a great many Americans.

Neutrality Regarding Benefits—Protecting Fragile Precedents

The "benefits" provision of the RFA reflects and protects (among other policy decisions) two recent Supreme Court decisions. Both were decided by 5-4 margins, in an area where the Court still shifts back-and-forth, unless the RFA provides an anchor to preserve these fragile rulings.

The first of these protected holdings is *Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S.Ct. 2510 (1995), holding it impermissible viewpoint discrimination to exclude student religious publications from the University's general subsidy of student publications. The Court concluded that free speech itself was threatened if religious speech were singled out for different treatment:

[43] March 18, 1996, report from American Law Division, Congressional Research Service.

> The governmental program at issue is neutral toward religion. Such neutrality is a significant factor in upholding programs in the face of Establishment Clause attack, and the guarantee of neutrality is not offended where, as here, the government follows neutral criteria and even-handed policies to extend benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse

The RFA also reflects the philosophy embodied—by a bare margin—in *Agostini v. Felton*, No. 96-552 (June 23, 1997). *Agostini* by 5-4 reversed a prior ruling on the same issue (a ruling in *Aguilar v. Felton*, 473 U.S. 402 (1985)), which likewise was decided by 5-4). The Court justified the reversal because the Court had also reversed two prior opinions on crucial points. Those cases likewise turned on margins of 5-4 in one instance[44] and also 5-4 in the other![45] What the Court gives, the Court can take away tomorrow, especially on 5-4 decisions! The RFA protects these important decisions from such judicial schizophrenia.

In *Agostini v. Felton*, the Supreme Court ruled that New York City may use federal Title I funds to provide special teachers on the premises of parochial schools, to give supplemental and remedial instruction to disadvantaged children.[46]

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[44] *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), holding that providing a sign-language interpreter for parochial school students was not a First Amendment violation. As noted in *Agostini v. Felton*, the Supreme Court in *Zobrest* "abandoned *Ball's* presumption that public employees placed on parochial school grounds will inevitably inculcate religion or that their presence constitutes a symbolic union between government and religion."

[45] *School District of the City of Grand Rapids v. Ball*, 473 U.S. 373 (1985) had held it unconstitutional for a public school district to provide special supplemental classes at public expense to students located at places leased from private religious schools. It was not a "pure" 5-4 decision, in the sense that some justices concurred in part while dissenting in part. One key part of *Bell* was later reversed in the *Zobrest* case, once again by a 5-4 ruling. Another part of the 5-4 ruling of *Bell* was later reversed by the Court in *Witters v. Washington Dept. of Services for the Blind* 474 U.S. 481.

[46] Despite discussing other grounds as dispositive, the *Agostini* decision was clearly motivated by a desire to permit the government to escape the $100-million expense of providing state facilities adjacent to the religious schools, so the teaching would not be on the grounds of a church school. It can be questioned whether the 5-4 majority was acting to protect religious freedom, or to protect government purse strings.

The Court opined that there were sufficient safeguards to assure that sectarian schools would not have a profit motive to provide religious instruction. It added:

> First, the Court has abandoned *Ball's* presumption that public employees placed on parochial school grounds will inevitably inculcate religion or that their presence constitutes a symbolic union between government and religion. *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1, 12-13. No evidence has ever shown that any New York City instructor teaching on parochial school premises attempted to inculcate religion in students. Second, the Court has departed from *Ball's* rule that all government aid that directly aids the educational function of religious schools is invalid. Other Establishment Clause cases before and since have examined the criteria by which an aid program identifies its beneficiaries to determine whether the criteria themselves have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination. Cf. e.g., *Witters*, supra, at 488; *Zobrest*, supra, at 10. Such an incentive is not present where, as here, the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis.

Neutrality Regarding Benefits—Protecting Current Policies

In addition to the Supreme Court precedents of *Rosenberger* and of *Agostini*, the "benefits" provision of the RFA protects other current policy. For example, the RFA's "benefits" provision protects these existing programs: Over a billion dollars each year in federal grants goes to Catholic Charities USA for various social services, ranging from shelters for the homeless, to aid to refugees and to unwed mothers. Over a billion dollars each year is spent on GI Bill education benefits, over $7-billion to federal Pell Grants to students, $23-billion a year in federally-guaranteed student loans, and $17-billion a year in direct lending to students, **all of which may be used at private and church schools, as well as at public schools.**

The RFA does **not** permit any appropriation or other funding for religious activities. Government funding for a religious purpose would still be banned by the prohibition on official religion found both in the First Amendment and in the RFA. However, once a government program was established, to accomplish a governmental purpose, participants could not be disqualified on the basis of religion or religious affiliation.

Other illustrations of the current problem (and the not-clearly-settled law in light of 5-4 Supreme Court rulings):

--Although the case was ultimately settled, the Federal Communications Commission denied a federal grant to Fordham University, because its campus station included a religious program on Sunday mornings. The federal district court[47] sided with the FCC that Fordham was disqualified by supposed church-state considerations. The RFA will prevent such injustices in the future.

--Provisions of state constitutions have been used to deny using general benefit programs when there was any connection with a religious institution. Again, the RFA will rectify this, because it applies at both the federal and the state levels[48].

--After the Oklahoma City bombing, it was reported that HUD attorneys almost denied nearby churches the ability to receive bombing repair money, on the same basis as

[47] *Fordham University vs. Brown*, 856 F. Supp. 684 (D.C.Cir., 1994), appeal dismissed per stipulation 94-5229 (D.C.Cir., Jan 5, 1996).

[48] In *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), although the federal constitution (by a 5-4 Supreme Court ruling) was not used to deny vocational rehabilitation funds to an individual who desired to become a pastor, the state constitution was ultimately used to block this.

other damaged property, because of "separation of church and state" concerns. Again, the RFA protects the ability to participate on an equal and non-discriminatory basis.

The "benefits" language does not guarantee any benefit to any person or group. Instead, it assures "equal access" ***if and when*** some benefit is made available for a permitted governmental purpose. For example, the RFA does not create a program of vouchers for education. *If* and when a unit of government chose to create them, however, the RFA would simply assure that all individuals and private entities are afforded equal access to them. **This is the identical standard already utilized in federal student loan programs and the G-I Bill.**

Private institutions, including those affiliated with churches, should be permitted to participate under the same standards as public institutions. For example, neither the University of Notre Dame nor Boston College are disqualified from federal education programs for being Catholic, nor is any other school disqualified on the basis of religion. This is a proper standard which has proven workable, which should be applied uniformly, and which should be protected from the uncertainty of the Supreme Court rulings in this area.

Conclusion

Rather than promoting understanding, recent decades of current Supreme Court decisions have promoted the opposite. A correct standard of tolerance would accept the benefits of listening respectfully to other views, rather than using the courts to silence them.

As four current Supreme Court justices have expressed[49]:

> . . . nothing, absolutely nothing, is so inclined to foster among religious believers of various faiths a toleration—no, an affection—for one another than voluntarily joining in prayer together, to the God whom they all worship and seek. Needless to say, no one should be compelled to do that, but it is a shame to deprive our public culture of the opportunity, and indeed the encouragement, for people to do it voluntarily. The Baptist or Catholic who heard and joined in the simple and inspiring prayers of Rabbi Gutterman on this occasion was inoculated from religious bigotry and prejudice in a manner that cannot be replicated. To deprive our society of that important unifying mechanism, in order to spare the nonbeliever what seems to me the minimal inconvenience of standing or even sitting in respectful nonparticipation, is as senseless in policy as it is unsupportable in law.

The wayward state of Supreme Court decisions has been decried by Chief Justice Rehnquist:

> George Washington himself, at the request of the very Congress which passed the Bill of Rights, proclaimed a day of "public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God." History must judge whether it was the father of his country in 1789, or a majority of the Court today, which has strayed from the meaning of the Establishment Clause[50]."

The American people have never accepted the Supreme Court's extra burdens levied against school prayer and against religious freedoms during the past 36 years. It has been 27 years since this House has acted upon the necessary constitutional amendment to correct this, and the time to remedy that is now. The Religious Freedom Amendment should be adopted.

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[49] Scalia, Rehnquist, White and Thomas, in their dissent in *Lee v. Weisman*, at 505 U.S. 646.

[50] *Wallace v. Jaffree*, 472 U.S. 38 (1985)

APPENDIX

References to God in State Constitutions & Preambles

Alabama	"invoking the favor and guidance of Almighty God"
Alaska	"grateful to God and to those who founded our nation…in order to secure and transmit succeeding generations our heritage of political, civil, and religious liberty"
Arizona	"grateful to Almighty God for our liberties"
Arkansas	"grateful to Almighty God for the privilege of choosing our own form of government, for our civil and religious liberty"
California	"grateful to Almighty God for our freedom"
Colorado	"with profound reverence for the Supreme Ruler of the Universe"
Connecticut	"acknowledge with gratitude, the good providence of God"
Delaware	"Through Divine goodness, all men have by nature the rights of worshipping and serving their Creator according to the dictates of their own conscience."
Florida	"being grateful to Almighty God for our constitutional liberty"
Georgia	"relying upon the protections and guidance of Almighty God"
Hawaii	"grateful for Divine Guidance"
Idaho	"grateful to Almighty God for our freedom"
Illinois	"grateful to Almighty God for the civil, political and religious liberty which He has permitted us to enjoy and seeking His blessing upon our endeavors"
Indiana	"grateful to Almighty God for the free exercise of the right to choose our own government"
Iowa	"grateful to the Supreme Being for the blessings hitherto enjoyed, and feeling our dependence on Him for a continuation of those blessings"
Kansas	"grateful to Almighty God for our civic and religious privileges"
Kentucky	"grateful to Almighty God for the civil, political, and religious liberties we enjoy"
Louisiana	"grateful to Almighty God for the civil, political, economic, and religious liberties we enjoy"
Maine	"acknowledging with grateful hearts the goodness of the Sovereign Ruler of the universe in affording us an opportunity, so favorable to the design; and imploring God's aid and direction in its accomplishments, do agree"

Maryland	"grateful to Almighty God for our civil and religious liberty"
Massachusetts	"acknowledging with grateful hearts, the goodness of the great Legislator of the Universe, in affording us, in the course of His providence, and opportunity"
Michigan	"grateful to Almighty God for the blessings of freedom"
Minnesota	"grateful to God for our civil and religious liberty"
Mississippi	"grateful to Almighty God, and invoking blessings of freedom"
Missouri	"with profound reverence for the Supreme Ruler of the Universe, and grateful for His goodness"
Montana	"grateful to Almighty God for the blessings of liberty"
Nebraska	"grateful to Almighty God for our freedom"
Nevada	"Grateful to Almighty God for our freedom in order to secure its blessings"
New Hampshire	"unalienable right to worship God according to the dictates of conscience"
New Jersey	"grateful to Almighty God for the civil and religious liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure…"
New Mexico	"grateful to Almighty God for the blessings of liberty"
New York	"grateful to Almighty God for our Freedom"
North Carolina	"grateful to Almighty God, the Sovereign Ruler of Nations"
North Dakota	"grateful to Almighty God for the blessings of civil and religious liberty"
Ohio	"grateful to Almighty God for our freedom"
Oklahoma	"Invoking the guidance of Almighty God"
Oregon	"to worship Almighty God"
Pennsylvania	"grateful to Almighty God for the blessings of civil and religious liberty, and humbly invoking His guidance"
Rhode Island	"grateful to Almighty God for the civil and religious liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors"
South Carolina	"grateful to God for our liberties"
South Dakota	"grateful to Almighty God for our civil and religious liberties"
Texas	"Humbly invoking the blessings of Almighty God"
Tennessee	"to worship Almighty God"

Utah	"Grateful to Almighty God for life and liberty"
Washington	"grateful to the Supreme Ruler of the Universe for our liberties"
West Virginia	"Since through Divine Providence we enjoy the blessings of civil, political and religious liberty…reaffirm our faith in and constant reliance upon God…"
Wisconsin	"grateful to Almighty God for our freedom"
Wyoming	"grateful to God for our civil, political, and religious liberties"
Vermont	"to worship Almighty God"
Virginia	"… duty which we owe to our Creator…mutual duty of all to practice Christian forbearance, love, and charity"